United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 12,229.

KAM KOON WAN, on His Own Behalf and on Behalf of All Other Persons and Employees of Defendant, Who Are Similarly Situated,
Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

REPLY BRIEF OF APPELLANTS.

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ARGUMENT.

I.

The Good-Faith Defense Was Improperly Determined by a Motion for Summary Judgment.

The rule of strict construction of the Portal-to-Portal-Pay Act of 1947 has been adopted by this court in its very recent case of **Lassiter v. Atkinson Co. et al.**, Nos. 12017-18, 11983-96, decided August 24, 1949, 9 W. H. Cases 126, where this court said:

> "While the act should be strictly interpreted (because of the substantial rights which it impairs) still it is remedial legislation and it must be interpreted with this in mind, lest we do violence to the intent of Congress."

Applying this rule of strict construction to the summary judgment granted by the trial court in the instant case, the affidavits in support of the motion for summary judgment would not constitute "pleading and proving". While the federal rules may "govern all proceedings" and there may be no exceptions stated in Rule 56, F. R. C. P. (Appellee's Brief, p. 14), the exception is construed from the language of Section 9, Portal-to-Portal Act, in the words, "if he pleads and proves."

The proof of good faith is still to be accomplished, even though the affidavits may be uncontroverted. The affidavits must state sufficient facts to prove the good faith. **Facts** which would establish good faith, rather than the legal conclusion to that effect, were inadequate in the record submitted to the trial court. With such a limited record before it on the motion, the trial court should have submitted the issue to a full trial. **Kennedy v. Silas Mason Co.**, 334 U. S. 249.

Appellee argues (Brief, pp. 20, 21, 28) that appellants could have obtained additional facts on discovery if the affidavits were not detailed enough or that appellee could have provided supplemental affidavits. However, the burden of proving an affirmative defense is on the pleader thereof, and the appellants need not secure the defense for appellee by requesting more facts, nor does the presence or absence of a counter-affidavit determine whether that burden has been met. There is no burden on appellant to prove lack of good faith. It is up to the appellee to show its good faith to the court conclusively.

II.

There Was No Good Faith in Defendants' Conformance With the Military Orders.

This court can set aside findings of the trial court where they are "clearly erroneous and due regard shall

be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52 (a), F. R. C. P. There was no opportunity on the motion for summary judgment for the trial court to judge the credibility of witnesses. That the holding of the trial court is erroneous becomes apparent after a study of the analysis of the record.

The defendant-appellee contends that appellants are too late to argue that the overtime provisions of the military orders do not apply to the parties (Brief, p. 23); and say that the affidavits show that the orders applied to appellee.

There is nothing in the record to indicate that the military governor construed the order as being applicable to appellee's employees. Had there been any inquiry or communication by appellee to the military governor or any governmental agency for a construction as to whether or not its employees were covered by the order, and then the defense asserted that the reply was relied upon, there would have been an objective basis for claiming good faith. But the affidavits contain no averment of fact that the military governor construed the orders to apply to appellee; they contain only legal conclusions by the affiants to that effect. Issue was taken with these conclusions before the trial court and this issue is not presented for the first time on appeal.

Appellee states that the military governor required the appellee to comply with body of order, regardless of the "Nothing herein * * *" clause (Appellee's Brief, p. 24). One of the questions presented to this court is, what does the order actually mean? Did the order require appellee to pay overtime pursuant to Fair Labor Standards Act or pursuant to the military order? By obeying the Fair Labor Standards Act appellee would not be violating the order. But appellee would have us believe

that the military governor used the phrase, "Nothing herein * * *" without meaning and that the employers were to pay no attention to the clause (Appellee's Brief, p. 24).

Appellee, with studied consistency, omits the word "superceding" from its discussion of the "Nothing herein * * *" clause throughout its brief. The word "superceding" in the phrase clearly means that the Fair Labor Standards Act should be superior to the order.

At page 28 of Appellee's Brief there is a further attempt to throw the burden of proof on the appellants. No argument is made to overcome its failure to show a change in payment when the military orders took effect. But rather, appellants are again charged with failure to prove lack of good faith. Appellants merely argue that the good-faith defense has not been proved in light of existing facts, and that a finding to that effect with the present record, is "clearly erroneous".

It is said (Appellee's Brief, p. 28) that the lack of additional facts could have been stated by appellants even though they did not have facts at hand to controvert good faith. Such a verified statement was before the trial court as Paragraph VIII of the complaint (R. 5). Appellants did argue to the District Court that there was no good faith. They did not remain mute on this issue. While previous violations were not before the trial court at the time of summary judgment, they are in the record as the result of the trial, and this court may consider the previous violations in determining whether the trial court erred in finding good faith.

> "If, on the entire evidence, we are 'left with the definite and firm conviction that a mistake has been committed' it is our duty to reverse the finding." **Lassiter v. Atkinson Co.**, supra.

Great reliance has been placed by the appellee on the case of **Curtis v. McWilliams Dredging Co.**, 78 N. Y. S. 2d 317. At page 31 appellee states that the facts are much the same as the instant case, but there is substantial basis for distinction. The trial court there, in discussing the good faith of the defendants, detailed the entire series of correspondence between the employer and the War Department, and the circular letters issued by the War Department to the defendant-employer and others similarly situated, all of which is absent in the instant case. In the **Curtis** case there was objective action taken by the employer and there were directions given him. The court said,

> "If we examine the relations of the defendants to the War Department, we find that although there were doubts in the minds of the defendants as to the applicability of the Statute, they were told that overtime would not be allowed under the Fair Labor Standards Act, and the very regulations and orders issued from time to time consistently bear out these instructions. * * * it is plain that there were orders and rulings relating to the payment of wages directed to the defendants and that the defendants complied with those rulings."

Since this Court of Appeals decided **Lassiter v. Atkinson Co.**, supra, subsequent to the filing of appellants' original brief, and some of the principles announced in that case dealing with good faith are pertinent here, we take liberty to discuss the **Lassiter** opinion as it applies to the facts of this case.

Evidence upon which the trial court relied for its findings of good faith in the **Lassiter** case, is missing here. The Black Co. neither sought advice as to applicability of the Fair Labor Standards Act, nor did they receive any information from any authoritative source that they

were not covered. In the **Lassiter** case employers evidenced by their conduct that they were trying to devise plans to get their employees overtime in order to keep their employees content. "* * * had they supposed the Fair Labor Standards Act applicable, they would have made more specific reference to it," instead of spending their efforts upon plans to get more overtime.

"Numerous directions of the War Department as to overtime payments at rates entirely inconsistent with those which the Fair Labor Standards Act would require" were assigned as another basis for finding good faith and that the employers were acting as reasonable men in complying with those numerous directions. No such "numerous directions by the War Department" to the Black Co. are found in the present case.

In the **Lassiter** case there was a War Department letter stating unequivocally that rulings from civilian agencies would be obtained by the War Department, thus prohibiting the employer from addressing questions to anyone other than the contracting officers. This is not in the instant record. Finally, there is not in this case, as there was in the **Lassiter** case, an "assurance that neither the War Department nor the employers considered that the Act was applicable to any of their employees, no matter what their duties."

Absent all these evidences of good faith and present those factors previously called to the court's attention, which spell out bad faith, we submit that the trial court was "clearly erroneous" in holding that the employer failed to pay overtime in good faith in reliance on the military orders.

CONCLUSION.

It is respectfully submitted that the employer did not violate the Fair Labor Standards Act because it relied in good faith on an administrative order requiring it to do so, but merely because it sought to deprive appellants of their proper compensation under the law. For all the reasons stated in Appellants' Briefs, it is requested that this court reverse those parts of the judgment of the court below from which appeal is taken, with costs to the appellants.

Respectfully submitted,

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